APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 12 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE RICARDO YANEZ,

Petitioner-Appellant,

v.

SECRETARY OF CORRECTIONS,

Respondent-Appellee.

No. 18-55116

D.C. No. 2:16-cv-09653-PSG-KES
Central District of California,
Los Angeles

ORDER

Before: HAWKINS and SILVERMAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 7) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE RICARDO YANEZ,

Petitioner,

v.

SECRETARY OF CORRECTIONS,

Respondent.

Case No. 2:16-cv-09653-PSG-KES

ORDER DENYING CERTIFICATE OF APPEALABILITY

"Unless a circuit justice or judge issues a certificate of appealability ["COA"], an appeal may not be taken to the court of appeals from ... the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court[.]" 28 U.S.C. § 2253(c)(1)(A). Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides in relevant part:

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue.

> If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
>
> (b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Rule 11, Rules Governing 28 U.S.C. § 2254 Cases.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In Slack v. McDaniel, 529 U.S. 473 (2000), the United States Supreme Court held that, to obtain a COA under § 2253(c), a habeas petitioner must show that "reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Id. at 483-84 (citation omitted). "The COA inquiry ... is not coextensive with a merits analysis." Buck v. Davis, 137 S. Ct. 759, 773 (2017). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Miller-El v. Cockrell, 537 U.S. 322, 338 (2003); see also Frost v. Gilbert, 835 F.3d 883, 888 (9th Cir. 2016) ("The standard for granting a certificate of appealability is low.").

"Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." Slack, 529 U.S. at 485. Because both are required, "a court may find that it can

dispose of the application [for a COA] in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Id. at 485. The general rule that courts should not pass upon a constitutional question if another dispositive ground is present "allows and encourages the court to first resolve procedural issues." Id. (citing Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

In the present case, the Court finds that Petitioner has not made the foregoing showing with respect to any of the grounds for relief alleged in the Petition. As discussed in the Report and Recommendation issued on September 29, 2017, the Petition is untimely and Petitioner cannot rely on the alternative trigger date in § 2244(d)(1)(D) because a letter brief he filed in the California Court of Appeal shows that he was aware of the basic facts supporting his ineffective assistance of counsel claims before the statute of limitations expired. (See Dkt. 34.) Accordingly, a COA is denied in this case.

DATED: 12/19/17

PHILIP S. GUTIERREZ
UNITED STATES DISTRICT JUDGE

Presented by:

Karen E. Scott

KAREN E. SCOTT
United States Magistrate Judge

APPENDIX C

O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE RICARDO YANEZ,
Petitioner,
v.
SECRETARY OF CORRECTIONS,
Respondent.

Case No. 2:16-cv-09653-PSG-KES

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the findings and recommendations of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: 12/19/17

PHILIP S. GUTIERREZ
UNITED STATES DISTRICT JUDGE

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE RICARDO YANEZ,

Petitioner,

v.

SECRETARY OF CORRECTIONS,

Respondent.

Case No. 2:16-cv-09653-PSG-KES

JUDGMENT

Pursuant to the Court's Order Adopting the Report and Recommendation of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

DATED: 12/19/17

PHILIP S. GUTIERREZ
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE RICARDO YANEZ,

Petitioner,

v.

SECRETARY OF CORRECTIONS, (CDCR),

Respondent.

Case No. CV-16-09653-PSG (KES)

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Philip S. Gutierrez, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

Jose Ricardo Yanez ("Petitioner"), a prisoner in state custody, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Dkt. 1 at 1-8 ["Petition"]; Dkt. 1 at 13-61 ["Addendum to Pet."].)[1] Respondent moved to dismiss the Petition

[1] All further page citations to the Petition and the Addendum to the Petition

as untimely. (Dkt. 21.) Petitioner filed an opposition to the motion. (Dkt. 32.) For the reasons set forth below, it is recommended that the motion be granted and that the Petition be dismissed as untimely.

II.

PROCEDURAL HISTORY

On June 9, 2014, a jury in the Los Angeles County Superior Court found Petitioner guilty of lewd or lascivious acts with a child under 14, aggravated sexual assault of a child, attempted sodomy by force, and oral copulation with a child. (Dkt. 22-1 [Lodged Document or "LD" 1] at 21-22.) The evidence presented at trial showed the following:

> On four occasions between 2004 and 2007, [Petitioner] sexually molested H.L., his live-in girlfriend's daughter, beginning when she was eight years old. H.L. reported the abuse in 2013, shortly after her 18th birthday. When she accused [Petitioner] of the abuse during pretextual telephone calls recorded by police, he repeatedly apologized, said he had to account to god for his actions, and wished he could take it all back. When she asked him why he had molested her, he said he felt like she had cared for him.

People v. Yanez, No. B259266, 2015 Cal. App. Unpub. LEXIS 5800, at *1 (Cal. App. Aug. 14, 2015). On September 24, 2014, Petitioner was sentenced to a prison term of 15 years to life for the aggravated sexual assault, plus 6 consecutive years on the other counts. (Dkt. 22-1 [LD 1] at 24-28.) See also Yanez, 2015 Cal. App. Unpub. LEXIS 5800, at *2.

Petitioner filed an appeal in the California Court of Appeal. His counsel filed a brief pursuant to People v. Wende, 25 Cal. 3d 436 (1979) and Anders v. California,

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are to the pagination utilized by Petitioner. All other page citations in this Order are to the pagination imposed by the Court's e-filing system, CM/ECF.

386 U.S. 738 (1976), asking the California Court of Appeal to examine the record independently. (Dkt. 22-2 [LD 2].) Petitioner filed a supplemental letter brief in which he contended that both his trial and appellate counsel had conflicts of interest and rendered ineffective assistance. (Dkt. 22-3 [LD 3]; see also Dkt. 22-4 [LD 4] at 3.) The California Court of Appeal issued a written opinion affirming Petitioner's convictions on August 14, 2015. (Dkt. 22-4 [LD 4].) See also Yanez, 2015 Cal. App. Unpub. LEXIS 5800. Petitioner did not file a petition for review in the California Supreme Court. (Petition at 3 ¶ 4; Dkt. 22-5 [LD 5].)

On December 6, 2016,[2] Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. (Dkt. 22-6 [LD 6].) While that petition was pending, Petitioner filed the instant federal Petition raising the same claims.

On January 6, 2017, Petitioner moved for a stay of his federal Petition while he exhausted the claims in state court. (Dkt. 5.) Before the motion was fully briefed, the California Supreme Court denied the exhaustion petition on February 1, 2017. (Dkt. 10.) This Court denied the stay motion as moot. (Dkt. 11.)

Respondent then moved to dismiss the Petition as untimely. (Dkt. 21.) The instant federal Petition raises two claims: (1) ineffective assistance of trial counsel, and (2) ineffective assistance of appellate counsel. (Petition at 5.)

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[2] This is the date Petitioner constructively filed the petition in the state court, i.e., the day he signed it. (Dkt. 22-6 at 55 [LD 6].) Respondent argues that Petitioner is not entitled to application of this "mailbox rule" because both his state petition and the instant federal Petition are untimely. (Dkt. 21 at 3-4 n.2.) Regardless of which date the Court uses—when the petition was signed on December 6 or when it was received by the appellate court on December 8—the petition was filed after the AEDPA statute of limitations had expired, as discussed below. In an abundance of caution, the Court gives Petitioner the benefit of the mailbox rule.

III.

DISCUSSION

A. The Petition is Untimely Absent Tolling or an Alternative Trigger Date.

1. The AEDPA Statute of Limitations

This action is subject to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Lindh v. Murphy, 521 U.S. 320, 336 (1997). AEDPA provides as follows:

> **(d) (1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> **(2)** The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Thus, AEDPA "establishes a 1-year time limitation for a state prisoner to file a federal habeas corpus petition." Jimenez v. Quarterman, 555 U.S. 113, 114 (2009). The statute of limitations period generally runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). "[F]or a state prisoner who does not seek review in a State's highest court, the judgment becomes 'final' for purposes of § 2244(d)(1)(a) on the date that the time for seeking such review expires." Gonzalez v. Thaler, 565 U.S. 134, 135 (2012).

2. Analysis

Petitioner did not seek review of his conviction in the California Supreme Court on direct appeal. His state court conviction therefore became final, for purposes of the AEDPA statute of limitations, when the time for seeking such review expired. Gonzalez, 565 U.S. at 135. An appellant has 40 days after the California Court of Appeal issues its opinion to seek review in the California Supreme Court. See Cal. R. Ct. 8.500(e), 8.264(b)(1); see, e.g., Smith v. Duncan, 297 F.3d 809, 812-13 (9th Cir. 2002), overruled on other grounds by Pace v. DiGuglelmo, 544 U.S. 408, 418 (2005); Wixom v. Washington, 264 F.3d 894, 898 (9th Cir. 2001).

The California Court of Appeal issued its opinion affirming Petitioner's convictions on August 14, 2015. (Dkt. 22-4 [LD 4].) Petitioner's conviction became final 40 days later, on September 23, 2015. The AEDPA statute of limitations therefore expired on September 23, 2016. Petitioner did not constructively file the instant federal Petition until December 28, 2016, 96 days later.[3] (Petition at 8.)

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[3] See note 3 above for discussion of the mailbox rule. The Petition was received by the Court on December 30, 2016. (Dkt. 1.) Regardless of which date the Court uses—the date the Petition was signed on December 28 or the date it was received by the Court on December 30—the Petition is untimely.

B. Petitioner is Not Entitled to Statutory Tolling for the Habeas Petition He Filed in the California Supreme Court in December 2016.

1. Statutory Tolling

AEDPA provides for statutory tolling as follows:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). The United States Supreme Court has interpreted this language to mean that AEDPA's statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects a petitioner's final collateral challenge, so long as the petitioner has not unreasonably delayed during the gaps between sequential filings. Carey v. Saffold, 536 U.S. 214, 219-21 (2002); Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir.), cert. denied, 529 U.S. 1104 (2000). However, statutory tolling "does not permit the reinitiation of a limitations period that has ended before the state petition was filed," even if the state petition was timely filed. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.), cert. denied, 540 U.S. 924 (2003); see also Larsen v. Soto, 742 F.3d 1083, 1088 (9th Cir. 2013).

2. Analysis

Here, Petitioner did not file any state habeas petitions until December 2016. At that point, the AEDPA statute of limitations had already expired in September 2016, one year after his conviction became final. The filing of his state habeas petition does not revive or reinitiate the limitations period. See Ferguson, 321 F.3d at 823. Thus, the Petition is untimely unless Petitioner is entitled to rely an alternative trigger date for the statute of limitations or obtain equitable tolling.

C. **Petitioner Cannot Rely on the Alternative Trigger Date for Newly Discovery Evidence.**

1. Alternative Trigger Date for AEDPA Statute of Limitations in Cases Involving Newly Discovered Evidence

Petitioner argues that he is entitled to the alternative trigger date in § 2244(d)(1)(D), which provides that the AEDPA statute of limitation begins to run on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," provided this date is later than the date that the petitioner's conviction became final.

"The statute of limitations begins to run under § 2244(d)(1)(D) when the factual predicate of a claim '*could have been* discovered through the exercise of due diligence,' not when it *actually* was discovered." Ford v. Gonzalez, 683 F.3d 1230, 1235 (9th Cir. 2012) (emphasis added); see also Juniors v. Dexter, No. 07-1377-DMG (AGR), 2011 U.S. Dist. LEXIS 38111 at *6 n.3, 2011 WL 1334422 at *2 n.3 (C.D. Cal. Jan. 14, 2011) ("[T]he statute starts running on the date when the petitioner knew or with the exercise of due diligence could have discovered the factual predicate of his claim, not from the date on which the petitioner obtains evidence to support his claim."). The statute also begins to run "regardless of when [the facts'] legal significance is actually discovered." Ford, 683 F.3d at 1235. "Time begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001).

By its terms, § 2244(d)(1)(D) applies only where the "factual predicate" of the claim could not have been discovered before Petitioner's conviction became final. "The question is when petitioner had the *essential facts* underlying his claim, not when he obtained *additional* evidence supporting his claim." Coley v. Ducart, No. 16-1168, 2017 U.S. Dist. LEXIS 25643 at *9, 2017 WL 714304, at *4 (E.D. Cal. Feb. 23, 2017) (emphasis added). "[I]f material does not 'change the character' of a

claim or provide new grounds for a petition, it is not a 'factual predicate' within the meaning of" § 2244(d)(1)(D). Id. (citing McAleese v. Brennan, 483 F.3d 206, 213-14 (3d Cir. 2007)); see also Ford v. Gonzalez, 683 F.3d 1230, 1235 (9th Cir. 2012), cert. denied, 133 S. Ct. 769 (2012) (holding § 2244(d)(1)(A) applies "only if *vital facts* could not have been known by the date the appellate process ended") (emphasis added).

"Although the statute of limitations is an affirmative defense, courts addressing the relative burdens under § 2244(d)(1)(D) have concluded that petitioner bears the burden of persuading the court that he exercised due diligence in discovering the factual predicate of his habeas claim." Thompson v. Hill, No. 03-255, 2004 U.S. Dist. LEXIS 22664 at *5, 2004 WL 2473307 at *2 (D. Or. Nov. 3, 2004) (collecting cases from other jurisdictions); see also Cooper v. Montgomery, No. 15-8683-JFW (SS), 2016 U.S. Dist. LEXIS 140018 at *7, 2016 WL 5899292 at *3 (C.D. Cal. Sept. 6, 2016); see, e.g., Majoy v. Roe, 296 F.3d 770, 776 n.3 (9th Cir. 2002) (finding petitioner did "not make an adequate showing of due diligence as required by § 2244(d)(1)(D) to invoke this tolling provision"). "Due diligence does not require 'the maximum feasible diligence,' but it does require reasonable diligence in the circumstances." Ford, 683 F.3d at 1235 (quoting Schleuter v. Varner, 384 F.3d 69, 74 (3d Cir. 2004)).

2. Analysis

Respondent argues that Petitioner is not entitled to application of the alternative trigger date in § 2244(d)(1)(D) because Petitioner raised the same ineffective assistance of counsel ("IAC") claims in the April 2015 letter brief he filed in the California Court of Appeal. (Dkt. 22-3 [LD 3].) Respondent argues that Petitioner's letter brief demonstrates that "the 'vital facts' of Petitioner's claims—counsel's failure to perform a specific task, the existence of a potential witness, the existence of the plea offer, etc.—were known to Petitioner while his direct appeal was still pending[.]" (Dkt. 21 at 9.) The "new evidence" Petitioner later obtained

and now attaches to his Petition, Respondent argues, is simply "descriptions of pre-trial and mid-trial events by Petitioner (which necessarily were already known to Petitioner) or by Petitioner's brother (which were known to Petitioner or could have been discovered by simply asking his brother to describe his interactions with trial counsel, as it appears [the brother] eventually did)." (Id. at 10.)

Petitioner admits that his letter brief to the California Court of Appeal "raised (to a lesser degree) most of the ineffective assistance of counsel claims raised on State Habeas and in this instant federal Habeas Corpus petition." (Add. to Pet. at 10.) He argues that the California Court of Appeal rejected the claims based on a lack of factual support, and he therefore began an investigation to collect more evidence to support those claims. (Id. at 10-12 [describing Petitioner's investigation].) He submits 353 pages of exhibits, which he claims constitutes "newly discovered" evidence. (Dkt. 3, 3-1, 3-2.)

The Court has reviewed the claims raised in the current Petition, the pro se letter brief Petitioner filed in the California Court of Appeal in April 2015, and the evidence Petitioner has submitted with his current Petition. As explained claim-by-claim below, the Court finds that Petitioner was already aware of the relevant facts, or could have discovered them with the exercise of due diligence, within one year of September 23, 2015, the date his conviction becoming final for AEDPA purposes. Petitioner therefore is not entitled to rely on the alternative trigger date for newly discovered evidence in § 2244(d)(1)(D).

a. IAC of Trial Counsel: Relying on Paralegal Rather than Hiring Psychological Expert (Addendum to Pet. at 28-33)

Petitioner argues that his trial counsel, Matt Kohn, should have "retain[ed] the assistance of an expert in child abuse and molestation cases, in order to discredit the alleged victim's allegations...." (Addendum to Pet. at 28.) Petitioner alleges that Kohn advised Petitioner's brother, Luis M. Yanez, against hiring an expert because it "would cost $10,000.00, and would only tell them 'what they had already known

and/or wanted to believe.'" (Id. at 29 [brackets omitted].) Although "the Yanez family informed [Kohn] from the outset of the case that funding was readily available to retain such an expert if necessary," Kohn instead advised hiring "a criminal law paralegal" who "had herself been sexually abused by her step father" and therefore could aid in evaluating the victim's credibility. (Id. at 33, 29.)

Petitioner raised this same basic argument in his April 2015 letter brief to the California Court of Appeal. (Dkt. 22-3 at 2-3 [LD 3, the letter brief].) Petitioner contended that "counsel was ineffective in that he retained an underqualified paralegal to evaluate [the victim's] police interviews," "based his trial strategy on this nonexpert's opinion," and "failed to retain an FBI analyst or sheriff's deputy as an expert." (Dkt. 22-4 at 3 [LD 4, opinion summarizing Petitioner's claims].)

The new evidence Petitioner now cites in support of this claim is as follows. First, emails between Petitioner's brother, Luis M., and Kohn from July 2013. (Dkt. 3 at 143-45 [Ex. T at 45-47]; Dkt. 3-1 at 1-2, 19-21 [Ex. T at 48-49, 66, 67-68].) These could have been obtained by Petitioner sooner, as they have been in his brother's possession and his brother has been actively helping with his defense and appeal. Second, a September 2016 affidavit from the paralegal, as well as emails indicating that Petitioner and his brother Luis M. had been trying to obtain this affidavit since June 2016. (Dkt. 3 at 43-51, 56-63 [Ex. J, M, N].) The affidavit states that when Kohn hired the paralegal, he "mentioned needing someone with 'special expertise' in child molestation matters"; that the paralegal told Kohn she had "never really worked on a criminal matter before"; and that she did not recall Kohn saying he planned to use her as an "expert witness" or that her work would be the "foundation of the defense." (Dkt. 3 at 56-59 [Ex. M].) This affidavit further supports Petitioner's argument that it was IAC for Kohn to rely on the paralegal alone, rather than hiring another expert witness. Together with Kohn's emails, it also indicates that Kohn may have misrepresented the paralegal's qualifications to Petitioner's brother.

Nevertheless, Petitioner was aware of the essential facts underlying this IAC claim in April 2015: that Kohn had chosen to hire a cheaper paralegal rather than a more expensive psychological expert in support of Petitioner's defense. This additional evidence in support of Petitioner's claim is not a new "factual predicate" that would support the alternative trigger date in § 2244(d)(1)(D).

b. IAC of Trial Counsel: Extorting Money from Luis M. to Hire Paralegal (Addendum to Pet. at 15-20)

Petitioner alleges that Kohn extorted money from Petitioner and his family because Luis M. paid Kohn $2,500 to cover the cost of hiring a paralegal, and in reality Kohn only paid the paralegal between $200 and $250 for her work. (Addendum to Pet. at 15-16.) Petitioner alleges that the "remaining balance left over from the paralegal fees was not owed to Matt Kohn for any legal assistance that he had provided, or that he would provide, in the case, and he had no legal claim to it." (Id.) Petitioner argues this "demonstrated disloyalty to Petitioner and his defense" and created a conflict of interest. (Id. at 18-20.)

This was not alleged in Petitioner's April 2015 letter brief. It appears that Petitioner and his family did not learn how much Kohn had paid the paralegal until June 2016, when the paralegal wrote an email to Luis M. estimating that Kohn had paid her $250 for her work on the case. (Dkt. 3 at 45 [Ex. J].) She later executed an affidavit to this effect on September 18, 2016. (Id. at 58 [Ex. M].) Petitioner attaches a February 2014 email from Kohn to Luis M. stating, "I obligated the paralegal to spend prep time with me and already used the $2,500 advanced for that purpose." (Dkt. 3-2 at 75 [Ex. T at 206].)

Assuming for the sake of argument that Kohn mishandled these paralegal fees and that this could form the basis of an IAC claim, Petitioner learned of the improprieties several months prior to when the AEDPA statute of limitations expired on September 23, 2016. He also obtained an affidavit from the paralegal several days before the statute of limitations expired. He has not explained why, with the exercise

of due diligence, he could not have timely filed a federal petition raising this claim.

c. IAC of Trial Counsel: Failing to Properly Communicate Plea Offer of 19 years (Addendum to Pet. at 21-28)

Petitioner says was made aware of this offer "[p]rior to the start of jury trial, during a court hearing that Petitioner was present for." (Addendum to Pet. at 22.) Kohn advised Petitioner to reject the offer "without first explaining to Petitioner what the terms and conditions of accepting that offer would be, or the amount of time that Petitioner would be required to actually serve out (after being awarded credits) in state prison." (Id. at 22.) Petitioner alleges that if Kohn had properly advised him of the "details and impact" of accepting the 19-year offer, he would have accepted it "in order to save his family the humiliation of a public trial, to avoid being exposed to the possibility of a life sentence, and to save his family the financial resources spent on legal fees." (Id. at 23.) After being found guilty at trial, Petitioner was given an aggregate sentence of 21 years to life. (Dkt. 22-1 [LD 1] at 24-28.)

Petitioner alleges that he later learned, based on the "newly discovered" evidence, Kohn "unilaterally decided that he would only allow Petitioner to accept a plea deal that was 3 years or less." (Addendum to Pet. at 22 [quotation marks and brackets omitted].) This "new" evidence is a March 2016 affidavit from Petitioner's brother Luis M., stating that Kohn "indicated that he would 'only' allow [Petitioner] to accept a plea deal that was 3 years or less," even though the prosecutor "continue to offer 19 years[.]" (Dkt. 3 at 18 [Ex. D].) Petitioner has also submitted an affidavit indicating that he learned of Kohn's 3-year position for the first time in March 2016, "through reading [the] sworn affidavit from my younger brother...." (Dkt. 3 at 73 [Ex. P ¶ 9].)

In Petitioner's letter brief to the California Court of Appeal, Petitioner alleged that, "Upon receiving [the paralegal's] report, Mr. Kohn decided that he would not entertain any pleas from the prosecutor that did not meet his criteria." (Dkt. 22-3 [LD 3] at 4.) Thus, by April 2015, Petitioner was aware that Kohn allegedly decided

what an acceptable plea offer would contain, even if Petitioner was not aware that Kohn's criteria was 3 years or less of prison time. Moreover, Petitioner could have learned of this "3 year" decision earlier, because the information was in the possession of his brother Luis M., who has been actively involved in his defense and appeal. Additionally, Petitioner himself was aware of the alleged cursory nature of Kohn's consultation with Petitioner in connection with Petitioner's decision not to accept the 19-year plea offer. Even if Petitioner was not aware that this could constitute an IAC claim, the issue is "when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." Hasan, 254 F.3d at 1154 n.3.

d. IAC of Trial Counsel: Failing to Investigate (Addendum to Pet. at 33-39)

Petitioner alleges that he gave Kohn a list of witnesses who could have given testimony lending "credibility to his claims of innocence, and to the position that he had been 'set up' by his ex-girlfriend, her sister, and the alleged victim." (Addendum to Pet. at 33-34.) Petitioner alleges that Kohn did not contact any of these potential witnesses, and he also failed to hire a private investigator, even though Petitioner's family "made funding available for that purpose." (Id. at 33-35, 37.) Petitioner contends, "The extent of Matt Kohn's investigation ... was his cursory review of the client files and discovery materials...." (Id. at 37.)

Petitioner raised the same argument and allegations in his April 2015 letter brief. (Dkt. 22-3 [LD 3] at 4, 12-13, 16-18.) The "new" evidence Petitioner now submits is as follows: (1) a June 2016 affidavit from his father, Luis A. Yanez, stating that Kohn was advised that the Yanez family was willing to pay to hire a private investigator and any other related expenses (Dkt. 3 at 32 [Ex. G]); (2) a list of potential witnesses and an affidavit from Petitioner stating that he gave this list to Kohn at their first attorney-client meeting (id. at 64-68 [Ex. O], 74 [Ex. P ¶ 10]); and (3) 2013 emails between Kohn and Petitioner's brother Luis M. discussing these

witnesses (id. at 103-04, 107, 112-14, 131 [Ex. T]).

This "new" evidence merely memorializes events that either Petitioner or his immediately family members were aware of from their personal knowledge since the trial in 2013. Although having the events in writing, and in some cases in sworn affidavits, corroborates Petitioner allegations, it does not provide a new factual predicate for a new claim or claims. This evidence also could have been obtained earlier with the exercise of due diligence, because Petitioner has been in frequent contact with his family members, who have been actively aiding his defense.

e. IAC of Trial Counsel: Forcing Petitioner to Testify and Inadequately Preparing Him to Testify (Addendum to Pet. at 39-41)

Petitioner alleges that during an attorney-client meeting at the county jail shortly before trial, Petitioner told Kohn did he not wish to testify in his own defense. (Addendum to Pet. at 39.) Kohn responded that if Petitioner did not testify, Kohn would "drop the case" and "stood up as if to leave the room at that very moment." (Id.) Petitioner alleges, "It was not until Petitioner told Matt Kohn that he would testify, and asked him not to drop the case, that [Kohn] sat back down again and resumed the meeting." (Id. at 39-40.) Petitioner "felt that he had no other choice [but to testify] in the matter in light of [Kohn's] stated threat" because he did not want to be left without an attorney for the "looming" jury trial. (Id. at 40-41.) Petitioner also alleges Kohn inadequately prepared him to testify. (Id.)

Although these exact facts were not alleged in Petitioner's April 2015 letter brief, the brief did allege that Kohn told Petitioner he would lose if he did not testify and "threatened to leave the case because ... [he] was not absorbing [Kohn's] instructions quick enough." (Dkt. 22-3 [LD 3] at 9, 12, 15.) In any case, the alleged meeting between Kohn and Petitioner was within Petitioner's personal knowledge, and therefore is not "new" evidence. That Petitioner may not have appreciated the potential legal significance of this interaction is not sufficient to trigger

§ 2244(d)(1)(D). See Hasan, 254 F.3d at 1154 n.3.

Petitioner was also personally aware of how much time Kohn spent prepping Petitioner to testify in the case, meaning this is not "new" evidence. In the April 2015 letter brief, Petitioner similarly alleged that Kohn had not adequately prepared him to testify. (Dkt. 22-3 [LD 3] at 9-10, 16.)

f. IAC of Trial Counsel: Failing to Communicate with Petitioner (Addendum to Pet. at 41-45)

Petitioner alleges that Kohn "failed to meet with Petitioner in order to establish a working 'attorney-client' relationship, and thereby, allow Petitioner to participate in his own defense" and "failed to personally keep the Petitioner updated on significant and meaningful developments in his case." (Addendum to Pet. at 2, 13.) Petitioner alleges that Kohn chose to mainly communicate with Petitioner's brother Luis M. and Petitioner's father Luis A., and then Petitioner would learn what was happening in the case second hand from his father during weekend jail visits. (Id. at 21-22.) Petitioner alleges that Kohn visited him in prison only 3-4 times for no more than an hour each visit. (Id. at 34, 42-43 [giving dates of visits].)

The same argument and allegations were raised in Petitioner's April 2015 letter brief. (Dkt. 22-3 [LD 3] at 3, 11-12.) The "new" evidence Petitioner submits is as follows: (1) an affidavit from Petitioner's brother Luis M. opining that Kohn had violated the attorney-client agreement by failing to visit Petitioner at least 10 times in prison (Dkt. 3 at 19 [Ex. D at ¶¶ 9-12]); (2) an affidavit from Petitioner himself swearing to the relevant allegations (Dkt. 3 at 73 [Ex. P at ¶ 8]); (3) 2013 emails between Kohn and Luis M. discussing if and when Kohn would visit Petitioner in jail (Dkt. 3 at 128-29, 132 [Ex. T]; Dkt. 3-1 at 43, 65, 69-70 [Ex. T]). This evidence was either within Petitioner's personal knowledge or the knowledge of his close family members. Petitioner could have uncovered this evidence within the normal AEDPA deadline with the exercise of due diligence.

g. IAC of Appellate Counsel (Addendum to Pet. at 46-49)

Ground 2 of the Petition alleges that Petitioner's appellate counsel, Tracy J. Dressner, was ineffective because she failed to investigate Petitioner's allegations that his trial counsel was ineffective and failed to file a state habeas petition alleging ineffective assistance of trial counsel. (Addendum to Pet. at 2, 46.) Petitioner argues that Dressner "could have easily obtained the evidence needed to raise the IAC claims with minimal investigate efforts," and "[b]ecause Petitioner was able to discover new evidence in support of his IAC claims with relative ease," Dressner "could have done the same." (Id. at 46, 49.)

Petitioner was aware of the facts underlying this claim since at least April 2015, when he argued Dressner was ineffective in his letter brief to the California Court of Appeal. (Dkt. 22-3 at 1 [LD 3, alleging Dressner should have filed IAC claims against Kohn and that Dressner "made her final decisions without having sufficient time to adequately review the contents of [Petitioner's] case file"].) Additionally, Petitioner's allegation that he uncovered the facts underlying his other claims with "ease" supports the Court's conclusions that he could have discovered all of the evidence he now submits within one year of when his conviction became final, i.e., by September 2016. In sum, Petitioner is not entitled to rely on the alternative trigger date in § 2244(d)(1)(D).

D. Petitioner is Not Entitled to Equitable Tolling.

1. Legal Standard for Equitable Tolling

In Holland v. Florida, 560 U.S. 631, 649 (2010), the Supreme Court held that the AEDPA's one-year limitation period is subject to equitable tolling in appropriate cases. In order to be entitled to equitable tolling, a petitioner must show both that (1) he has been pursuing his rights diligently, and (2) some extraordinary circumstance stood in his way and prevented his timely filing. See Holland, 130 S. Ct. at 2562 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). "[T]he threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the

exceptions swallow the rule." Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir.), cert. denied, 537 U.S. 1003 (2002). Consequently, as the Ninth Circuit has recognized, equitable tolling will be justified in few cases. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003); Waldron-Ramsey, 556 F.3d at 1011 ("To apply the doctrine in 'extraordinary circumstances' necessarily suggests the doctrine's rarity, and the requirement that extraordinary circumstances 'stood in his way' suggests that an external force must cause the untimeliness, rather than, as we have said, merely 'oversight, miscalculation or negligence on [the petitioner's] part, all of which would preclude the application of equitable tolling.'"). The burden of demonstrating that the AEDPA's one-year limitation period was sufficiently tolled, whether statutorily or equitably, rests with the petitioner. See, e.g., Pace, 544 U.S. at 418; Miranda, 292 F.3d at 1065.

2. Analysis

In his opposition to the motion to dismiss, Petitioner contends that he is entitled to equitable tolling "for the period of time that he was engaged in ongoing pro se investigations," i.e., between March 1 and September 29, 2016. (Dkt. 32 at 11-12.) Petitioner argues that "he was not able to bring his instant federal petition before the Court until that investigative process was completed." (Id. at 12.) In support of the request for equitable tolling, Petitioner points to the following allegations in his Petition:

Petitioner did not file a petition for review in the California Supreme Court "[b]ecause appellate counsel, Tracy J. Dressner, refused to render any further assistance following the Appellate Court's denial of relief, and because Petitioner lacked the legal education and/or understanding to represent himself." (Addendum to Pet. at 10.) After his convictions were affirmed by the California Court of Appeal on August 14, 2015, Petitioner "began trying to educate himself on the laws and procedures that govern the prosecution of State and federal Habeas actions." (Id.) In November 2015, Petitioner realized he needed help and "began to search for any

fellow prisoner (or prisoners) who might be able to render legal assistance to him." (Id. at 11.) Petitioner eventually met a fellow prisoner in the law library, Johnny Paul Collins, who agreed to help Petitioner; Collins began reviewing Petitioner's case file in mid-February 2016. (Id.)

Between March 1 and September 29, 2016, Collins "began the pro se investigation(s) into allegations that [trial counsel] Matt Kohn and [appellate counsel] Tracy J. Dressner both rendered ineffective assistance of counsel in various areas of their representations." (Id. at 11-12.) During this investigation, Collins obtained notarized affidavits from Petitioner, Petitioner's brother Luis M., Petitioner's father Luis A., and the paralegal hired by Petitioner's trial counsel. (Id.) Collins also obtained emails between Kohn and Luis M. (Id.)

These allegations are insufficient to support a finding that Petitioner is entitled to equitable tolling. Although the Court appreciates the difficulties inherent in attempting to do legal research and collect evidence while incarcerated, these difficulties are not the type of "extraordinary" circumstance required for a finding of equitable tolling. See, e.g., Ramirez v. Yates, 571 F.3d 993, 998 (9th Cir. 2009) (finding "ordinary prison limitations on Ramirez's access to the law library and copier" were not "extraordinary").

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IV.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) granting Respondent's motion to dismiss (Dkt. 21); and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: September 29, 2017

Karen E. Scott

KAREN E. SCOTT
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to timely file Objections as provided in the Federal Rules of Civil Procedure and the instructions attached to this Report. This Report and any Objections will be reviewed by the District Judge whose initials appear in the case docket number.

Additional material from this filing is available in the Clerk's Office.